No. 89-542

In The

Supreme Court of the United States

October Term, 1989

RUDY PERPICH, as Governor of
The State of Minnesota,

and

THE STATE OF MINNESOTA,
by its Attorney General
Hubert H. Humphrey, III,

Petitioners,

vs.

UNITED STATES DEPARTMENT
OF DEFENSE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

RESPONDENTS' THEORY THAT THE ARMY CLAUSE IS LIMITLESS IN ITS POWER, THEREBY GIVING CONGRESS AUTHORITY TO NULLIFY THE MILITIA CLAUSES, IS HISTORICALLY INACCURATE, UNNECESSARY, AND FAR-REACHING IN ITS EFFECT.

Respondents' arguments in support of the constitutionality of the Montgomery Amendment, 10 U.S.C. § 672(f), rest on the theory that the army clause is not limited by the militia clauses. It is a theory that would permit unrestricted federal authority over peacetime training of the National Guard. This theory, rejected in 1986 by the then Chief of the National Guard Bureau (NGB) and the NGB's legal advisor, is based solely on an overreaching and erroneous interpretation of the *Selective Draft Law Cases*, 245 U.S. 366 (1918).

Respondents do not challenge the State of Minnesota's position that the Montgomery Amendment disregards the unambiguous text of the militia training clause and its purpose, which was to limit federal authority in peacetime. Respondents' argument – that the dual enlistment system properly permits a constitutionally protected state entity, the National Guard, to be "repackaged" as a federal entity, the National Guard of the United States, and thereby be divested at any time of state control over training – is untenable. Respondents' novel theory that state participation in the National Guard is "voluntary" is illusory because the National Guard is the constitutional militia, the only militia organization states are permitted to create.

Respondents' rejection of the declared exigency requirement as a predicate to federal assumption of National Guard training authority in the absence of war disregards the text of the Constitution, the Framers' intentions, case precedents and legislative history. Respondents also fail to make a persuasive showing that unlimited federalization of the National Guard is necessary or that the dual enlistment system and the "Total Force" concept is threatened in any way by adhering to the settled understanding that governors are constitutionally entitled to withhold consent to militia training during peacetime in the absence of a national emergency.

A. Respondents Argument Rests Solely On An Erroneous Interpretation Of the Selective Draft Law Cases.

The central premise of respondents' position is that army clause power is plenary and can be used to nullify the militia clauses. This premise rests squarely on respondents' interpretation of the *Selective Draft Law Cases*, an interpretation that is overreaching and erroneous.[1] Properly read, the *Selective Draft Law Cases* provide no support to respondents and, therefore, the foundation for their entire argument crumbles.

There are three reasons why respondents' reliance on the *Selective Draft Law Cases* is misguided. First, the *Selective Draft Law Cases* simply cannot be separated from the dramatic context in which the decisions were written. The decision upheld the power of Congress to draft soldiers during World War I. Its strong and expansive words were undoubtedly intended to send a message to a world at war. Congressional power during a declared war is at its zenith. This Court has held that the power to wage war is the power to wage war successfully. *Lichter v. United States*, 334 U.S. 742, 767 n.9 (1948) (citation omitted). This power, "absolutely essential to the safety of the Nation, is not destroyed or impaired" by the other provisions of the Constitution. *Id.* at 781.[2]

Second, the *Selective Draft Law Cases* did not involve training of the militia, a right explicitly reserved to the states in the Constitution. Indeed, the Solicitor General, in arguing

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[1] Respondents also rely for support for their interpretation on the companion case of *Cox v. Wood*, 247 U.S. 3 (1918). Petitioners' analysis of the relevance of the *Selective Draft Law Cases* applies equally to *Cox*.

[2] *See also Schenck v. United States*, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right"); *Korematsu v. United States*, 323 U.S. 214, 220 (1944) ("when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger").

for the validity of the statute, advised the Court that the statute "recognized and safeguarded" state authority over training. 245 U.S. at 372.[3] It is simply unpersuasive for respondents to pin their argument on a decision so unrelated to the context and legal issue presented here.[4]

Third, even if the *Selective Draft Law Cases* is relevant to deciding this case, its language supports petitioners' view of the proper interplay between the militia and army clauses. In the *Selective Draft Law Cases*, the Court cautioned against confounding "distinct and separate" areas of federal and state authority within the army and militia clauses "to the end of confusing both the powers and thus weakening or destroying both." *Id.* at 384. One of the "distinct and separate" areas of state authority under the militia clauses recognized by the Court is state authority in "carrying out" militia training. *Id.*

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[3] Respondents apparently argue that the *Selective Draft Law Cases* is relevant to this action because it involved conscription of members of the unorganized militia. Resp. Br. at 19 n.11. However, the unorganized militia is nothing more than the civilian able-bodied male population between the ages of 17 and 45 who are not members of the National Guard. 10 U.S.C. § 311. Because federal law prohibits the states from maintaining a functioning militia other than the National Guard, 32 U.S.C. § 109(a), the unorganized militia is a militia in name only, having no statutory duties. *See infra* at 12-13.

[4] This position was endorsed by federal authorities at the time what became the Montgomery Amendment was proposed. The Office of Legal Advisor in the National Guard Bureau concluded that the *Selective Draft Law Cases* "has no bearing on the Militia Clause as it pertains to peacetime training of the National Guard." National Guard Bureau, Office of Legal Advisor Memorandum at 20; Pet. Reply Br. App. (hereinafter "App.") at 26.

The memorandum prepared by the Office of Legal Advisor, National Guard Bureau, was recently obtained upon petitioners' request to the U.S. Senate Armed Services Committee. Petitioners understand that the memorandum and other material contained in the appendix to this reply brief are part of the public unpublished record of a hearing conducted by the Committee's Subcommittee on Manpower and Personnel on July 15, 1986.

at 383. This area of authority was reserved to the states in the absence of "strict necessities" or "exigencies" requiring Congressional exercise of its army clause power. *Id.* at 382-83.

Respondents' construction of the *Selective Draft Law Cases* as recognizing a limitless army clause simply does not square with the language of the decision cautioning against weakening a constitutional power. Properly construed, the *Selective Draft Law Cases* stands for the proposition that undiminished authority over military forces is conferred on Congress by the army clause during "exigencies" or "strict necessities." But this power should not be confused with the "distinct and separate" reserved state authority to train the militia at all other times.

This interpretation of the decision reflects the canon of constitutional construction that when "fundamental principles [of the Constitution] are of equal dignity, neither must be so enforced as to nullify or substantially impair the other." *Dick v. United States*, 208 U.S. 340, 353 (1908). Thus, upon reviewing proposed legislation which ultimately became the Montgomery Amendment, the National Guard Bureau's (NGB) Office of Legal Advisor correctly concluded: "[Congress] may not interpret the 'Army' clause to nullify or impair the clear intent of the 'Militia' clause as to training of Guard unit[s] and members." National Guard Bureau, Office of Legal Advisor Memorandum at 22; Petitioners' Reply Br. App. (hereinafter "App. ___") at 28.

B. Respondents' Theory Ignores The Clear Historical Understanding Of The Meaning Of The Militia Clauses.

Respondents' claim that history supports its view that Congress may exercise army clause powers to eliminate militia clause protections is deceptive and inaccurate. Perhaps most telling and revisionist are respondents' attempts to ignore the clear and unambiguous intent of the Framers to place limits on the power of the federal government through the militia clauses. Until enactment of the Montgomery Amendment in 1986, the role of the militia clauses as a limit on the

army clause, at least with respect to training, was unchallenged.

Two aspects of respondents' argument are telling. First, and perhaps most profoundly, respondents ignore the text of the Constitution which "reserv[es] to the States respectively . . . the Authority of Training the Militia. . . . " U.S. Const. art. I, § 8, cl. 16 (clause 16). Respondents' theory gives the federal government under the army clause total "authority of training the militia."

Second, respondents make no attempt to distinguish the unambiguous intent of the Framers' work. There is no question that the Framers believed that the militia clauses were a significant limitation on federal authority during peacetime. The federalists did not, contrary to respondents' assertions, secure "virtually unrestricted powers." Resp. Br. at 14. The finely tuned divided militia authority gave plenary militia control to the federal government when the national security was threatened and, in the absence of such a threat, control was given to the states. The compromise clearly did not give the federal government plenary control over the militia at all times and for all purposes. A proposal to that effect was rejected by the Framers. *See* J. Madison, Notes of Debates on the Federal Convention 164 (Hunt 1920) (Hamilton plan). Yet that is precisely what respondents seek to accomplish through their theory in this case. Respondents' discussion of the Framers' intent focuses solely on the army clause and ignores the key issue in this case, which is the extent of the limits placed on Congress' to control the militia in peacetime. While respondents try to characterize petitioners' position as radical and new, it is respondents who depart dramatically from the text and history of the militia clauses.

In commenting on the Framers' intent, respondents assert, without foundation, that fears of federal oppression of the states were "no doubt exaggerated at the time the Constitution was ratified." Resp. Br. at 33. However, there was a substantive basis for the Framers' fears. The state-controlled check on federal oppression of the states was the Framers' reaction to the tyrannical power of the English army. Their structural decision to keep the army small and to rely on

essentially state controlled militia forces for much of the nation's defense has been undisturbed for two centuries.[5] This basic decision, together with civilian control over the military, has undoubtedly contributed to a relatively peaceful and free domestic experience, almost unique in the modern world.

Respondents question the contemporary vitality of the Framers' decision. They suggest that unless the Civil War was "wrongly decided," basic state control over the militia can no longer serve as a check on the abuse of federal military power. Resp. Br. at 33. However, neither that war nor the subsequent constitutional amendments diluted or limited the Constitution's explicit grant of state authority over the militia or undermined the purpose of this authority as a check on the abuse of federal military power.

Respondents, again seeking to question any modern application of the Framers' decision, assert that the Framers only discussed state control over the militia as a check on the abuse of *domestic* military adventurism, not *foreign* military adventurism. Resp. Br. at 33-34. This is not a significant observation. The Framers' discussion of military adventurism focused on a domestic context only because the nation was isolationist and did not foresee foreign entanglements.[6] There is no evidence that the Framers would have distinguished between domestic and foreign military adventurism.

Amicus National Guard Association of the United States seeks to place a different "spin" on the Framers' intent. It argues that the phrase "discipline prescribed by Congress" in the militia training clause provides a constitutional basis for federal determination of militia training locations. However, if by "discipline" the Framers meant to reserve to the federal

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[5] As this Court noted in *United States v. Miller*, 307 U.S. 174, 179 (1939), "[t]he sentiment of the time [of the ratification of the Constitution] strongly disfavored standing armies; the common view was that adequate defense of the country and laws could be secured through the militia – civilians primarily, soldiers on occasion." *See also* 32 U.S.C. § 102.

[6] *See* W.T. Reveley, *War Powers of the President and Congress* 61 (1981).

government the authority to train, the militia training clause would absurdly be granting state power with one phrase only to take it back with another. In point of fact, the Framers anticipated that "discipline" might someday be expansively construed to erode state training authority. They rejected that notion and guarded against that possibility. At the Constitutional Convention, Delegate Sherman withdrew his motion to delete the training clause after Delegate Elseworth cautioned him that such an action might result in the power to discipline overwhelming the training process. S. Doc. No. 695, 64th Cong., 2d Sess. 35 (1917) (Madison's Notes of the Convention) (*The Militia*). Even if the right to discipline can be construed to include the right to determine training locations, reserved state authority over militia training still entails the right to say "no" absent a threat to the national security.

Respondents further claim that Congress understood in 1933 that it was creating the dual enlistment system to avoid the restrictions of the militia clauses.[7] Resp. Br. at 39. If so, why did Congress explicitly limit in the Act federal control

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[7] Respondents' arguments that Congress has enacted statutes in the past that contradict petitioners' legal position with respect to the militia clauses is incorrect. The three statutes respondents cite as examples fully comport with petitioners' theory.

The first statute is the Act of June 19, 1935, ch. 277, 49 Stat. 391. It only provided federal authority in a national emergency, a position fully in line with petitioners' position.

The second statute is the Act of June 15, 1933, ch. 87, § 38, 48 Stat. 155. It provides that the President may order NGUS officers to active duty in the National Guard Bureau. The National Guard Bureau is the part of the Department of Defense that coordinates the training and organization of state National Guard units, 10 U.S.C. § 3040. The 1933 statute does not contradict petitioners' theory because the order to active duty is for duty in an administrative agency that coordinates the *training* and *organization* of the state National Guard. Such an order is pursuant to Congress' power to "organize, arm, and discipline the militia."

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over the National Guard to wars or declared national emergencies? The reason is that Congress clearly understood that the militia clause required state control over training in the absence of the exigencies described in the Act. The House and Senate reports accompanying the creation of the dual enlistment system indicated clearly that in the absence of a national emergency, control over the militia would remain absolutely with the states. *See* S. Rep. No. 135, 73d Cong., 1st Sess. 2 (1933), H.R. Rep. No. 141, 73d Cong., 1st Sess. 5 (1933). Moreover, when Congress eliminated the war or declared national emergency limitation in the Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 (The 1952 Act), it replaced that limitation with the provisions which explicitly required gubernatorial consent for federalization of the Guard in the absence of war and national emergency. *See* 10 U.S.C. § 672(b) and (d). The debate over these provisions indicated that Congress understood that gubernatorial consent was required by the militia clauses of the Constitution. *See* Pet. Br. at 29-30.

From the founding of the Nation, to the discussion of the interplay of the army and militia clauses in the *Selective Draft Law Cases*, to the consistent unbroken pattern of congressional deference to reserved state authority over the militia embodied in the militia clauses, the Framers, the courts, and the Congress have all respected reserved state authority over the militia – until 1986.[8] It is respondents' position that radically

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The third statute is the Act of March 25, 1948, ch. 157, § 5(a), 62 Stat. 90. It provides that National Guard members can, "with their consent," be given additional training or other duty. However, National Guard members cannot effectively give consent without authorization of state officials. They are subject to the control of their state commanders. As a result, the consent provisions maintain state control.

[8] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), does not support the respondents' proposition that the army clause need not accommodate the militia clause. *See* Resp. Br. at 27 n.21.

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departs from the settled course of our Nation's history and traditions.

C. The State's Expressly Reserved Training Authority Over The National Guard Is Not Divested By "Repackaging" It As The National Guard Of The United States.

Respondents erroneously assert that "[t]his case challenges the constitutionality of the dual enlistment concept. . . ." Resp. Br. at 11. On the contrary, this case challenges the constitutionality of the Montgomery Amendment because it distorts the dual enlistment system. The dual enlistment system requires state National Guard members to simultaneously enroll in the National Guard of the United States (NGUS), a reserve component of the national armed forces. 10 U.S.C. §§ 101(11) and (13), 591(a), 3261, 8261; 32 U.S.C. § 101(5) and (7). It is an essential aspect of traditional military policy of the United States. 32 U.S.C. § 102. The State of Minnesota fully supports dual enlistment and has not challenged the concept in any respect.[9] Petitioners challenge the Montgomery Amendment because it perverts the dual enlistment system by denying states their constitutional right to maintain a militia. *United States v. Miller*, 307 U.S. 174, 178 (1939) (second amendment gives right to maintain militia).

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The two clauses at issue in that case, the equal protection clause and the commerce clause, were unlike the army and militia clauses, not designed to limit the power of the other.

[9] *See generally* State of Minnesota, Department of Military Affairs Biennial Report: 1 July 1985 – 30 June 1987 at 34-35, 44-45, 49(n.d.) (listing numerous overseas deployments of Minnesota Army and Air National Guard).

Under respondents' theory, state National Guard members can, pursuant to the army clause, be ordered to federal active duty for any purpose at any time in their capacity as members of the NGUS. *See* Resp. Br. at 20. Thus, in effect, the reserved state training authority over the National Guard provided in the militia training clause can be negated simply by "repackaging" the National Guard as the NGUS despite the fact that the membership of the two organizations is identical.[10] As a consequence, the check on abuse of national military authority that the Framers intended to provide by reserving state training authority is entirely negated.

This theory of dual enlistment is profoundly wrong. It effectively precludes the states from retaining militia training authority at any time federal authorities wish to preclude it. Congress, under the statutory framework as modified by the Montgomery Amendment and respondents' theory of a limitless army clause, can "relabel" the National Guard, and any other defense force a state may establish, as a federal entity. Thus, under respondents' theory, the federal military can gobble up any number of state defense forces as soon as they are created and strip the states of training authority over them at any time.[11] Furthermore, under respondents' theory, state reserved authority in Clause 16 to appoint militia officers can be abrogated if Congress chooses to exercise its limitless army clause power.

Respondents wrongly argue that under their theory, "the Militia Clauses continue to limit federal control over the State National Guard," and the states have "layers of protection" enabling them to deflect federal absorption for the

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[10] While it may theoretically be possible for memberships in the National Guard and National Guard of the United States to not be identical under the statutory framework, respondents have identified no such circumstance in the 57 year history of dual enlistment and it seems an extremely remote possibility.

[11] States are prohibited from maintaining troops other than National Guard and defense forces authorized by 32 U.S.C. § 109(a). *See infra* at 12-13.

purpose of maintaining order within the state. Resp. Br. at 27. The two identified "layers" are supposedly a limited gubernatorial veto suggested by the legislative history of the Montgomery Amendment and the states' ability to maintain a defense force other than a National Guard. Resp. Br. at 29. However, under respondents' theory, the army clause can always be invoked to abrogate the militia clauses. It is difficult to understand from this how the militia clauses would "limit federal control." Furthermore, under respondents' theory, neither "layer" is constitutionally required and can thus be removed by Congress under its army clause power whenever Congress dec des to do so. Thus, the states have no enduring "layers" protecting their peacetime training authority. Reserved express constitutional powers simply cannot be divested through a creative "repackaging" of the constitutional militia. This is, in essence, is respondents' novel theory of dual enlistment.

D. The National Guard Is The "Militia" Protected By The Constitution, And The States' Reserved Rights To A Militia Are Not Satisfied By The Authority To Establish "Defense Forces."

Respondents assert a novel theory that state participation in the National Guard is "voluntary" and as a result, states may choose to "withdraw" from the National Guard. States may, according to respondents, establish "defense forces" which satisfy any constitutional right to maintain a militia. However, respondents' position, properly viewed, does not set up a voluntary choice between having a National Guard or some other type of militia. Rather, it puts the states to a "Hobson's Choice:" either either maintain a National Guard and submit to federal control or relinquish any right to keep a militia. It is a choice the federal government cannot force the states to make under the Constitution.

The Second Amendment guarantees to states the right to maintain a militia. *United States v. Miller*, 307 U.S. at 178 (1939) (Constitution, and particularly the Second Amendment insures the "continuation and renders possible the effectiveness of" the militia). Furthermore, this Court has clearly

recognized that "[t]he National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16 of the Constitution." *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46, *vacated and modified on other grounds*, 382 U.S. 159 (1965).[12] In view of these decisions, it is particularly clear that any suggestion that the states could give up their National Guard is simply an argument that the militia could be abolished. Since the states have a right to a militia, Congress cannot force the states to choose between abolishing the militia and agreeing to restrictions not permitted by the Constitution.

State defense forces are not "militia," as the term is used in the Constitution. The militia is a hybrid organization subject to both state and federal control. *Mela v. Callaway*, 378 F. Supp. 25, 28 (S.D.N.Y. 1974). A state militia may be called forth pursuant to U.S. Const. art I, § 8, cl. 15 (clause 15), subjected to plenary federal control, and sent outside of the state. Further when "in the Service of the United States," the militia can be paid, transported and receive medical care from the federal government under the power to "organize, arm and discipline the militia" and to "govern[ ] such part of [the militia] as may be employed in the Service of the United States." None of these characteristics apply to state defense forces. They expressly "may not be called" into the armed forces. 32 U.S.C. § 109(c). They are to be used only "within the jurisdiction concerned" and may not be paid, transported or receive medical care from the federal government 32

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[12] The federal statutory framework also demonstrates that Congress has understood the National Guard to be the organized militia. 10 U.S.C. § 311(a). There is no statutory authority for a state to maintain an organized militia other than the National Guard. 32 U.S.C. § 109(a).

To the extent that respondents may be claiming that the constitutional militia guarantee is satisfied by the existence of an unorganized militia, *see* 10 U.S.C. § 311(b), that clearly is no right at all. The unorganized militia is not an actual military force. Rather, it is a defining feature of every state's population, i.e., able-bodied males between the ages of 17 and 45 who do not belong to the organized militia. *See* 10 U.S.C. § 311.

U.S.C. § 109(d). In short, defense forces bear no resemblance to the militia and are not distinguishable from police forces.

Moreover, even if the defense forces could be construed to be the constitutional militia or made statutorily to resemble the constitutional militia, respondents' sweeping theory of the army clause would allow the federal government to take these forces completely away from the states at anytime for any reason and for any purpose, thus leaving the states again with no forces to satisfy the states' reserved authority protected by the militia clauses of the Constitution. The deceptive nature of respondents' theory is readily apparent here. Respondents assure states that their constitutional protections are guaranteed by establishment of an organization which according to respondents' own theory could be federalized at any time for any reason.

E. Congress' Power To Call The National Guard Into Federal Service When The National Security Is Threatened Is Fully Supported By The Historical Understanding Of The Militia Clauses.

Respondents contend that the requirement that Congress or the President declare a threat to the national security before reserved state authority over the militia is superseded is "entirely made up" and is without "a shred of support." Resp. Br. at 43. To the contrary, it is respondents' theory – that the army clause can supersede the militia clause at will and that there exist no state limits on federal power in the militia clauses – that should be characterized as "entirely made up." Indeed, the concept of requiring an "exigency" or a threat to the national security before federalization of the National Guard under the army clause is central to interpretation of the relationship between the army clause and the militia clauses. The concept is supported by substantial evidence, including the text and structure of the Constitution, the intent of the Framers, and the historical understanding of the meaning of the militia clauses. Respondents' theory, based solely on an erroneous reading of a wartime conscription case, is truly without a "shred of evidence" to support it.

The power to federalize the National Guard when there exists a threat to national security is a power Congress may

exercise pursuant to the army clause. The Framers' understanding of the power to raise and support armies, as interpreted by Hamilton and Madison, indicates that the power was intended to be exclusive and plenary only in the context of a threat to the national security.[13] There exists no credible evidence that the Framers intended the army power to swallow the militia clause protections except in time of exigency. Absent "exigencies," shared state and federal control was designed as a fundamental structural check on potential abuse of federal military power.[14]

Throughout the history of the Nation, each time the subject of the interplay between the army and militia clauses has been addressed by this Court or Congress, the concept of "exigencies" which permit exercise of army clause power is central to the analysis. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Selective Draft Law Cases*, 245 U.S. 366 (1918); Act of June 15, 1933, ch. 87, 48 Stat. 155 (The 1933 Act). The 1952 Act replaced the exigency concept with gubenatorial consent, an acceptable constitutional alternative. Until 1986 and enactment of the Montgomery Amendment, the concept of "exigencies" or its consent alternative have guided interpretation of the permissible extent of Congress' army power to override the militia clauses. The concept is not "made up;" rather it is the key to understanding the interplay of the army and militia clauses.

Respondents claim that the three limitations to calling forth the militia, in clause 15 would prevent federalization outside of those conditions if petitioners' position were upheld by the Court. That claim is incorrect. Congress' power under the army clause permits federalization to meet a threat to the national security. The existence of an exigency overcomes reserved state authority as embodied in the militia clauses. Congress is simply not acting under its clause 15 powers when federalizing the National Guard pursuant to a

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[13] *The Federalist No. 23* (A. Hamilton) and *The Federalist No. 45* (J. Madison); *see discussion* in Pet. Br. at 25-6.

[14] *See discussion* in Pet. Br. at 7-26.

national emergency; it is acting under its army clause powers.[15]

Contrary to respondents' claims, the requirement of a threat to the national security imposes no improper extra-constitutional procedural requirements on the federal government. Clause 15 already requires that Congress activate the militia pursuant to three enumerated contingencies. The exigency requirement sets forth no additional procedure. This requirement simply allows Congress to activate the militia under the army clause. Whatever procedural requirements are mandated by a clause 15 call pursuant to its specified contingencies are the requirements which may be used when Congress exercises its army clause power to utilize the militia to deal with a threat to national security.[16]

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[15] Even if Congress is held to be acting under its clause 15 powers to federalize the National Guard in an emergency, the three conditions need not be read to impose an absolute limitation on Congress' power in such circumstances. At the time of its founding, the Nation was small and of extremely isolationist sentiment. Reveley, *War Powers of Congress* at 61. In this light, it is likely that the three contingencies specified in clause 15 represent those threats to the national security that the Framers could then envision. These categories were likely indicative of the gravity of circumstance necessary to call forth the militia rather than literal limitations on congressional power. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (using the concept of exigency or threats to the national security interchangeably with the contingencies in clause 15); *see* Brief for the National Guard Association of the United States, *et al.* at 26 (hereinafter "NGAUS Brief"); Hirsch, The Militia Clauses of the Constitution and the National Guard, 56 U. Cinn. L. Rev. 919, 930-42 (1988).

[16] Respondents' argument that petitioners' position would have permitted Governor Faubus to prevent the calling of state National Guardsmen to active duty to defend a federal district court order requiring desegregation is incorrect. Resp. Br. at 22 n.17. The notion that Governor Faubus would have had any authority to resist a presidential call to execute the laws of the United States under clause 15 is without any credible support. Governor Faubus would have no such authority whether the National Guard was called in its militia status or in its Army Reserve Status.

It is respondents' theory that the army clause can supersede the militia clause at will which is entirely unsupportable. This theory cavalierly ignores authority explicitly reserved to the states in the text of the Constitution and the clear intent of the Framers to provide an explicit limit on the abuse of federal military power. It also ignores the consistent congressional historical respect and understanding of state reserved authority over the militia. Respondents' theory is clearly unsupported by facts or law.

G. Unlimited Federalization of the Constitutional Militia Is Far-Reaching and Unnecessary.

The obvious implications of respondents' legal position are far-reaching. Put very simply, respondents' argument that the army clause is plenary and may be used by Congress to nullify the protections of the militia clauses does not stop at the Montgomery Amendment. Respondents' argument, if adopted by this Court, would permit elimination of any state involvement in the constitutional militia in direct violation of the language of Article I.[17] Respondents' position adheres to no discernible limiting principles. It reduces the militia clauses to a dead letter.

Respondents' brief is rife with alarmist warnings that the "Total Force" concept cannot exist without the Montgomery Amendment and that petitioners' position will lead to "severe consequences for the ability of our armed forces to meet the

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[17] While petitioners emphatically disagree with the legal conclusion reached by Amicus National Guard Association, its description of respondents' legal position is accurate.

> Thus, the hybrid nature of the National Guard does not create a backdoor through which the federal government can obtain units whenever it does not want to be bothered with the restrictions of the militia clauses. The United States is seeking nothing less than to read those restrictions out of the Constitution.

NGAUS Brief at 12.

Nation's defense needs." Resp. Br. at 13, 41. Such suggestions completely ignore the history of the "Total Force" concept and are directly contradicted by the candid statements in 1986 of Lt. General Emmett H. Walker, Jr., then Chief of the National Guard Bureau, a federal agency that coordinates the readiness of the National Guard. Lt. General Walker, in prepared remarks, stated:

> The actions of the few governors have not in any way impaired the nation's ability to rely on the National Guard. * * * Readiness has not been effected. * * * The National Guard Bureau maintains that any attempt to change the peacetime control of the Guard is a constitution issue and would require a constitutional amendment not simply legislative. And, even if a legislative remedy were legal, we maintain that the pursuit of such legislation at this time is an overreaction to an operationally insignificant but perhaps politically very embarrassing incident.[18]

In response to questioning from members of the subcommittee, Lt. General Walker expressed strong personal views in opposition to removal of the gubernatorial consent provisions:

> Senator Levin: General Walker, do you oppose this legislation as unnecessary? Is that the bottom line, your personal opinion is in opposition?
>
> General Walker: Sir, that is exactly the way I feel about it. I do not think we need it. I have no necessity for it to do my job. I just think it is something you are tinkering with that has served us

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[18] Presentation by LTG Emmett H. Walker, Jr., Chief, National Guard Bureau Before the Manpower and Personnel Subcommittee, Senate Armed Services Committee (July 16, 1986) (uncleared version) at unnumbered pp. 4-5; App. at 4-6 (hereinafter "Walker Statement"). General Walker testified that some of his prepared remarks were not approved for delivery to the subcommittee. A copy of the uncleared statement was, however, inserted into the unpublished hearing record.

well for years and years and years and that is state control.[19]

Respondents' claims directly contradict the Nation's experience under the "Total Force" concept.[20] Since Total Force was initiated in 1971, hundreds of thousands of National Guard personnel have trained overseas[21] with the consent of governors. A mere 48 were kept from training in Central America.[22] "Total Force," by any possible measure, has been an unqualified success – without need for the Montgomery Amendment. Respondents' claims rest on a single incident, which they attempt to bootstrap into the outrageous proposition that the Nation's governors will willfully prevent National Guard members from being properly trained if they are given the chance. That proposition is without a shred of support in our Nation's history and defies all logic and common sense.

Respondents similarly claim that the National Guard cannot be properly trained if states retain any authority over the National Guard. In addition to the unchallengeable conclusion that the Constitution guarantees to states the "authority of training the militia," the facts once again do not support this argument. Federal authorities can, and routinely do, train the National Guard with states' consent. States can, and

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[19] U.S. Senate Committee on Armed Services, Subcommittee on Manpower and Personnel, June 15, 1986, Hearing Transcript (unpublished) at 134; App. at 33.

[20] Indeed, the "Total Force" concept embodies a national policy that is as old as the Constitution. The "Total Force" concept, a small standing federal army bolstered by a much larger reserve force of citizen soldiers, is the type of military organization clearly envisioned by the Framers. *See* 32 U.S.C. § 102; Court of Appeals Dissenting Opinion at A-18, n.3.

[21] Lt. General Walker's testimony indicated that in 1986 alone, more than 42,000 Army and Air Guard members were scheduled to train overseas in 46 countries. More than 9,000 members from 43 states and territories were scheduled to train in Central America. Walker Statement, *supra* n.18, at unnumbered p. 2; App. at 2.

[22] Walker Statement, *supra* n.18 at unnumbered p. 3; App. at 3.

routinely do, conduct training as specified by federal authorities. Moreover, if federal authorities determine that the lack of National Guard readiness poses a threat to the national security, they can quickly assume plenary control over training. The unassailable fact remains: National Guard members are well-trained and the states have been fully supportive of training.

Respondents' theory acutely demonstrates that the federal military's desire for expediency and appetite for power remains voracious. Respondents' position overplays the *Selective Draft Law Cases*, overthrows consistent historical understandings, exhibits a parade of horribles unsupported by fact, and eliminates an important constitutional protection. Justice Robert Jackson addressed the consequences of distorting constitutional protections in the name of national security. He stated:

> The principal then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.

Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting) (footnote omitted).

Petitioners' position preserves the delicate balance so wisely established by the Framers which has served the Nation well for over 200 years. No facts exist which warrant elimination of the militia clauses.

CONCLUSION

For all the foregoing reasons, petitioners respectfully urge this Court to hold that the Montgomery Amendment is unconstitutional.

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CHIEF, NATIONAL GUARD BUREAU
BEFORE THE MANPOWER AND PERSONNEL SUBCOMMITTEE
SENATE ARMED SERVICES COMMITTEE
JULY 16, 1986
(Uncleared Version)

The National Guard, Army and Air, is at the highest level of combat readiness, highest level of full and traditional manning, highest level of equipment fill and highest level of training readiness in its 350 year history. The Guard today provides 46% of the Army's combat units and 70% of the Air Force's fighter-interceptor force and provides the greatest combat readiness return for each defense dollar and trairing hour expended of all the components, active, Guard and Reserve. This achievement has been accomplished with the Guard under state control – appointing officers, training individuals and units in the U.S. and abroad and providing command emphasis on combat readiness, starting with the Governor and continuing down the chain of command. The Congress has played a major role in providing the resources to the Guard to make these accomplishments possible.

The legislative initiative being considered by this committee proposes to eliminate the Governor, and therefore state control, from the chain-of-command for all overseas training of the Guard. It is being proposed in reaction to the public comments of, and in some cases restrictions placed by, a few Governors on Guard training in Honduras.

It is imperative to note that the National Guard Bureau and the National Guard are committed to being full partners in the Total Force and we recognize our responsibility to carry a full partners share. We also stand firmly committed to American policy in Central America and fully believe that training deployments to Central America, like all overseas training is worth while [sic], readiness enhancing and challenging to our soldiers and airmen.

SLIDE 1

I'd like to take a moment now and show you where the Governors stand on Guard involvement in Honduras. Only Massachusetts is totally opposed to training in Central America. Maine, Vermont Ohio and Washington have said they will not permit units to deploy to Honduras and the remaining States shown in yellow have either said they would approve requests on a case by case basis or in other instances would not permit the Guard to train the Freedom Fighters, operate on the Honduran-Nicaraguan border or some similiar [sic] condition.

In 1986, more than 42,000 Army and Air Guard members will train overseas in 46 countries. More than 9,000 Army and Air Guard personnel from 43 states and territories will train in Central America alone.

SLIDE 2

I will now graphically depict for you what states have participated in U.S. activities in Central America this

year. In spite of the public comments and political assertions of some Governors concerning regional policy, all but one has or will let his troops participate. The map does not show the Pennsylvania and Nevada Guards' participation in Costa Rica or the Texas and Colorado Guards' participation in Bolivia.

Of the remaining 11 states not participating this year, only Massachusetts' Governor Dukakis has said he would not permit his troops to train in Central America. Of the remaining States shown in white, Mississippi led the guard into the humanitarian airlift business for Central America under the authority of the Denton Amendment, Vermont trained in Panama last year, Louisiana joined Puerto Rico and Florida in starting the major engineer exercises in Central America in 1984 and 1985, and Connecticut units trained in Honduras last year.

The few Governors that have precipitated the proposed bill have stopped a total of 48 people from training in one country – Honduras – not the other 45 countries. Those 48 people constitute .0001 percent of the total deploying force – less people than report to sick call on an average base on any given day, less people than have had to forego scheduled training for employer support reasons and less people than have had to forego participation due to other commitments. Clearly 48 people in comparison to the deploying forces or the entire Guard strength is insignificant in terms of impact.

The proponents of a legislative initiative maintain that the actions of the few Governors have made reliance on the Guard as a part of the Total Force less tenable and

their public pronouncements and actions have adversely impacted combat readiness.

There are two separate and distinct issues that must be addressed. First, are the postulations of the proponents of the bill factual and justified and secondly, but most important, not withstanding the thesis of the proponents, is state control of the Guard not mandated by the Constitution; does the Constitution not reserve to the States the authority of training the Guard.

We must first address the postulation of the proponents of the initiative. The actions of the few Governors have not in any way impaired the Nation's ability to rely on the National Guard. In time of emergency or war, the President and Congress have respective authorities to call or mobilize part or all of the Guard into Federal service without the consent or concurrence of the Governors. Therefore, reliance on the Guard for National Defense has not been effected.

Readiness has not been effected. The actions of Governor Brennan of Maine to prohibit 48 of his soldiers from training in Honduras this year has not had, and will not have, an adverse impact on combat readiness just as California Governor Deukmejian's historic decision last year to prohibit 18 tanks and 450 California Guard personnel from training in Honduras had no impact on that units readiness. Governor Deukmejian's decision marked the first time in history that a Governor prevented his troops from *training* in a foreign country.

In spite of these decisions, the unit's readiness was not adversely impacted and the Guard was able to accomplish the assigned mission by using units from other

states. The fact that although these two Governors did prevent these two units from training in Honduras, they permitted deployments world-wide to include other countries in Central America as requested by National Guard Bureau.

The thesis that a unit that does not train in Honduras is adversely impacted in readiness terms is subjective at best and without basis in fact. If it were true, one would be forced to conclude that the majority, 80% or more, of units Active, Guard and Reserve, Army, Navy, Air Force and Marines are less ready and have been adversely impacted because they have not trained in Honduras.

Article 1, Section 8 of the Constitution reserves "to the States the Authority of training the militia (Guard) to a discipline prescribed by Congress. The word discipline as defined in legal and legislative discussions of this clause simply means a standard, level or bench mark; it has never been defined as including control, direction or approval/disapproval authority. An example of a proper "discipline prescribed by Congress" is the fifteen-day annual training period for Guardmembers contained in 32 U.S.C. Section 502. However, such annual training is carried out under the authority of the Governor who is constitutionally charged with training Guardmembers. It is quite clear from the wording that the *authority*, and therefore the right to approve and concur in training, is a fundamental state right. Had the framers of the Constitution wanted the Federal Government to have the authority over the militia (Guard) they would have said that.

Currently, the relevant statutes require the Governor's *consent* for the order to active duty of National

Guard members for overseas training. The current law is consistent with the Constitution since it recognizes the Governor's authority over National Guard Training. However, the proposed bill would eliminate any requirement to obtain a Governor's consent for such overseas training and would thereby strip the Governor of his authority over training. The proposed bill is therefore unconstitutional.

The National Guard Bureau maintains that any attempt to change the peacetime control of the Guard is a Constitution issue and would require a Constitutional amendment not simply legislative. Any, even if a legislative remedy were legal, we maintain that the pursuit of such legislation at this time is an overreaction to an operationally insignificant but perhaps politically very embarrassing incident.

Since this is a Constitutional issue, a legislative initiative to remove the Governor from peacetime control of overseas training of his National Guard is not appropriate. Furthermore, no initiative is warranted based on the facts.

I do not need new laws to accomplish my duties with the States, just your continuing support. Existing legislation empowers me to distribute resources, issue equipment and authorize and federally recognize units and individuals of the Army and Air National Guard.

MEMORANDUM ON THE CONSTITUTIONAL ISSUES RAISED BY PROPOSED LEGISLATION WHICH WOULD REMOVE THE AUTHORITY OF GOVERNOR WITH RESPECT TO OVERSEAS TRAINING OF THE NATIONAL GUARD

Legislation has been proposed to change several sections of the United States Code pertaining to the National Guard. The purpose of this memorandum is to address any legal issues raised by the proposed changes.

The sections of the U.S. Code proposed to be changed are 10 U.S.C. § 672(b), 10 U.S.C. § 672(d), and 32 U.S.C. § 501. The proposed bill is set forth at enclosure 1 hereto. The current law and proposed law are set forth side-by-side for comparison at enclosure 2 for 10 U.S.C. § 672 and at enclosure 3 for 32 U.S.C. § 501.

Currently, 32 U.S.C. § 501(b) provides that "[t]he *training* of the National Guard shall be conducted by the several States and Territories, Puerto Rico . . . , and the District of Columbia in conformity with this title."[1] Accordingly, under present law, the Governors of the respective states conduct and supervise National Guard training through their respective Adjutants General.[2]

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[1] Hereinafter the several States and Territories, Puerto Rico . . . , and the District of Columbia will be referred to as "states".

[2] 32 U.S.C. § 314 provides Adjutants General of each state who shall perform the duties prescribed by the laws of that jurisdiction, and shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may

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Under the proposed legislation, an exception would purportedly be made to the states' authority over training the National Guard. The exception would allow the order to active duty of Guard units or members by the Secretaries of the Army and Air Force or their designees *for training* outside the United States, its territories and possessions *without* the necessity for the consent of or coordination with the Governors of the several states.

The central legal issue is whether this proposed legislation is unconstitutional. If it is, it would not be proper to go forward with the proposed legislation. If it is not unconstitutional, then it is proper for Congress to decide whether it is prudent to proceed with the proposed legislation, to take other action, or to take no action at all to change the law.

I. RELEVANT CONSTITUTIONAL PROVISIONS

The U.S. Constitution contains a number of important provisions dealing with the matters that pertain to the issue raised by the proposed legislation.

The Constitution specifically authorizes Congress

> "To raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two Years; . . . . "[3].

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prescribe. In practice, the State Adjutants General are in charge of the day to day operations of the National Guard.

[3] Art. I, § 8, cl. 12

It also empowers Congress

> "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; . . . . "[4].
>
> "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, *reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia* according to the discipline prescribed by Congress; . . . ."[5]. (Emphasis supplied).

The first clause is commonly known as the "Army clause" and the last two are collectively known as the "Militia clause".

The President is also granted substantial power by the Constitution:

> "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . . . "[6].

The major issue to be resolved is how the above clauses of the Constitution should be interpreted in the specific matter at hand, namely the proposed legislation which would remove any authority of the state and its Governor over overseas training of National Guard units or members.

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[4] Art. I, § 8, cl. 15

[5] Art. I, § 8, cl. 16

[6] Article II, § 2, cl. 1

It is clear and is not contested that the Federal Government has very substantial and broad authority over the National Guard (militia), but that authority is not unlimited. While the congress has broad authority to raise and support Armies and the President has broad authority as commander in Chief, the Constitution clearly reserves to the States two specific matters, that is "the Appointment of the Officers, *and* the Authority of training the militia." These reserved powers to the states are to be exercised "according to the discipline prescribed by Congress."

To properly interpret the above provisions, an in-depth analysis is required.

II. NATURE OF THE NATIONAL GUARD

The National Guard, as a matter of constitutional law,[7] is a State military organization subject to Federal

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[7] Article I, § 8, clauses 15 and 16 of the Constitution are set forth *supra*. Article I, Section 10 of the Constitution provides, in relevant part:

> No state shall, without the Consent of Congress, keep Troops, or Ships of War in time of Peace.

See also the Second Amendment to the Constitution which provides:

> A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.

The purpose of the Second Amendment is "to preserve the effectiveness and assure the continuation of the state militia." *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert*

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regulation that is unique in kind and extent. The framers of the Constitution viewed the Militia as a military force available to the Federal Government for Federal purposes (indeed, for much of our history it was the only significant military force in being available to the Federal Government). They also recognized that it comprised, at the time, the standing armies of several sovereign States which had no intention of entirely surrendering their military capability to an untested central government. They accordingly left the Militia to the States but subjected it as a condition of national union, to Federal controls sufficient to insure its utility as a Federal military force. Thus, from the very beginning of our history as a nation, the Federal and State interests in the Militia have been inseparably intertwined.

The National Guard is, of course, the "modern Militia reserved to the States by . . . the Constitution." *Maryland v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 159 (1965). Under its constitutional mandate, the National Guard has a dual Federal-state identity: in its Federal capacity, it is a component of the United States Army or Air Force,[8] and in its state capacity, it is

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denied, 435 U.S. 926 (1977); *see also United States v. Miller*, 307 U.S. 174, 178 (1939) wherein the Supreme Court has referred to the Second Amendment as guaranteeing the right of the states to maintain and *train* militias.

[8] 10 U.S.C. § 261(a) provides:

> The reserve components of the armed forces are:
>
> (1) The Army National Guard of the United States . . .

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the organized state militia. *See New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 278-79 (3d Cir., 1982), *cert.*

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(5) The Air National Guard of the United States . . .

10 U.S.C. § 3078 provides that "The Army National Guard while in the service of the United States is a component of the Army." *See generally* 10 U.S.C. §§ 3495-3502.

10 U.S.C. § 8078 provides that "The Air National Guard of the United States while in the service of the United States is a component of the Air Force." *See generally* 10 U.S.C. §§ 8495-8502.

10 U.S.C. § 3062(c) provides:

> The Army consists of –
>
> (1) the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve . . . .

10 U.S.C. § 8062(d) provides:

> The Air Force consists of –
>
> (1) the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve . . . .

10 U.S.C. § 3077 provides:

> The Army National Guard of the United States is the reserve component of the Army that consists of –
>
> (1) federally recognized units and organizations of the Army National Guard; and
>
> (2) members of the Army National Guard who are also Reserves of the Army.

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denied, 459 U.S. 988 (1982). In its federal capacity, the purpose of the National Guard is to augment the regular forces when ordered into federal service in time of war or national emergency[9] and to carry out those purposes in Article I, § 8, cl. 15 (*supra*) when called into Federal service. In its state capacity, the Governor may direct the National Guard to perform missions and activities in support of the state. *See* 32 U.S.C. § 109(b).

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10 U.S.C. § 8077 provides:

> The Air National Guard of the United States is the reserve component of the Air Force that consists of –
>
> (1) federally recognized units and organizations of the Air National Guard; and
>
> (2) members of the Air National Guard who are also Reserves of the Air Force.

10 U.S.C. § 311 provides:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.
>
> (b) The classes of the militia are –
>
> (1) the organized militia, which consists of the National Guard and the Naval Militia; and
>
> (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

[9] 32 U.S.C. § 102 and 10 U.S.C. § 262

While the conceptual positioning of the National Guard has not changed since 1789, the actual Federal involvement in the control of National Guard affairs has increased as the importance of the National Guard in national defense planning has increased. From the days of the Minutemen of Lexington and Concord until just before World War I, the various state militias, while embodying the concept of a citizen army, lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States armed forces. *Maryland v. United States*, 381 U.S. at 46. The National Defense Act of 1916 materially altered the status of the militias by constituting them as the National Guard. With the passage of the National Defense Act of 1916, "the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards." *Id.* at 46, 47. By this Act, Congress established the standards for the organization, training and discipline of the Guard, including, for the first time, standards for the appointment and retention of its personnel.[10] Congress, in return, "authorized the allocation of federal equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state emoluments." *Id.* at 47.

In spite of congressional "reorganization" of the militia into the National Guard, the state governors remain in charge of their state's National Guard, except when it is called or ordered into active Federal service. *Maryland v. United States*, 381 U.S. at 47. In most, if not all, instances

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[10] *See generally* H.R. Rep. No. 297, 64th Cong., 1st Sess. 1-15 (1916); 53 Cong. Rec 4312-17 (March 17, 1916).

the Governors administer the Guard through State Adjutants General, who are required to report periodically to the National Guard Bureau, a Federal organization,[11] on the Guards' reserve status. *Id.* Thus, except when called or ordered into active Federal service, the states exercise control over their respective militias, circumscribed only by the "discipline prescribed by Congress," U.S. Const., Art. I. Sec 8, C1. 16, which is implemented by federal regulations promulgated by the Secretaries of the Army and of the Air Force. The concept of state control of the National Guard has been summarized as:

> It is almost too plain for argument, that the power . . . given to Congress over the militia, is of a limited nature, and confined to the objects specified in [the Constitution]; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities.

Houston v. Moore, 18 U.S. (5 Wheat) 1, 50 (1820) (Opinion of Story, J.). *See also* 10 U.S.C. § 3079 and § 8079 which provides that, when not on active duty, members of the

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[11] The National Guard Bureau's statutory mandate is 10 U.S.C. § 3015 which provides, in relevant part:

> (1) There is a National Guard Bureau of the Department of the Army and the Department of the Air Force, headed by a Chief who is the adviser to the Army Chief of Staff and the Air Force Chief of Staff on National Guard matters. The National Guard Bureau is the channel of communication between the departments concerned and the several States, Puerto Rico, the Canal zone, and the District of Columbia on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States.

Army and Air National Guard of the United States shall be administered, armed, equipped and trained in their status as members of the Army or Air National Guard (that is, under state control).

In the post-World War II period the Federal Government has undertaken virtually the entire responsibility for funding and equipping the National Guard and prescribing its organization and training. To this end, a large body of Federal regulations directive upon the states, has grown up together with a joint Bureau, within the Departments of Army and Air Force (the National Guard Bureau) to administer and enforce them. Failure of a state to abide by federal regulations could result in a loss of federal support for its National Guard. 32 U.S.C. § 108.

As the Supreme Court has recognized, the Guard has been organized so that it is "capable of being assimilated with ease into the regular military establishment of the United States." *Maryland v. United States*, 381 U.S. at 46. It provides the federal government with operationally ready combat units, combat support units, and qualified personnel for active duty to support augmentation requirements to fulfill Army and Air Force war and emergency contingency commitments, and to perform such peacetime missions as are compatible with training requirements and the maintenance of mobilization readiness. This vital federal role is evidenced by Congress' statutory determination that "it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line of defense of the United States be maintained and assured at all times." 32 U.S.C. 102.

III. CURRENT STATUTORY AUTHORITIES FOR CALLING OR ORDERING THE NATIONAL GUARD IN FEDERAL SERVICE.

There are a number of authorities for calling or ordering the National Guard into federal service. A list of these authorities is included as enclosure 4 to this memorandum. The National Guard may be involuntarily called into federal service to provide federal aid for state governments when necessary to suppress insurrection in any state against its government[12]; when unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States cannot be enforced through normal means[13]; when there is interference with state and federal law[14]; and when there is invasion or danger of invasion by a foreign nation, there is a rebellion or danger of a rebellion against the authority of the United States, or the President is unable with the regular forces to execute the laws of the United States.[15]

National Guard units or members may be involuntarily ordered to active duty when there is declaration of war or national emergency declared by Congress[16]; there is a national emergency declared by the President (limited to 1 million members and 24 months in duration)[17]; and there is a need for the President to augment active

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[12] 10 U.S.C. § 331
[13] 10 U.S.C. § 332
[14] 10 U.S.C. § 333
[15] 10 U.S.C. § 3500 and § 8500
[16] 10 U.S.C. § 672(a)
[17] 10 U.S.C. § 673(a)

forces for an operational mission (limited to 100,000 members and 90 days in duration).[18]

There are two other sections that may be used to order National Guard units or members into federal service, namely 10 U.S.C. § 672(b) and 10 U.S.C. § 672(d). Unlike the other statutory authorities noted above, 10 U.S.C. §§ 672(b) and (d) do not require any conditions precedent (i.e., war, national emergency, augment operational mission, insurgency, rebellion, invasion) for their use. These authorities may be used at any time; provided however, in the case of National Guard members, the Governor *consents* to the order under either section. Also, the consent of the individual service member is required under 10 U.S.C. § 672(d). While use of § 672(b) is limited to not more than 15 days per year, there is no duration limit for use of § 672(d). These two sections are set forth at enclosure 2. The proposed legislation would eliminate the requirement under both sections for the Governors' consent for overseas training of Guard units or members.

In the case of the National Guard, the provisions of 10 U.S.C. § 672(b) and 10 U.S.C. § 672(d) have traditionally been used in peacetime situations where it is necessary to place National Guard units or members on federal active duty for some purpose, such as overseas deployment training.

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[18] 10 U.S.C. § 673b

IV. OVERSEAS DEPLOYMENT TRAINING

While not required by statute, National Guard members are currently required to participate in overseas deployment training in a federal active duty status by Army and National Guard regulations.[19] Units or individuals are ordered to active duty under 10 U.S.C. § 672(b) or 10 U.S.C. § 672(d) for such overseas training, assuming the Governor of the state consents.

Under current law, training within the United States of National Guard members is ordinarily conducted pursuant to one of the various sections of title 32 of the United States Code under the authority of the Governor.

If it is required for some reason that training be conducted in a federal status under title 10 of the United States Code, the Governor has initial authority over such training since he must consent for a Guard member or unit of his state to train in a federal status under 10 U.S.C. § 672(b) or 10 U.S.C. § 672(d). Once the Governor consents and the individual or unit is ordered to active duty, the individual or unit is subject only to federal authorities for the period of training. 32 U.S.C. § 325(a).

Under the proposed legislation, the need for the Governor's consent would be removed for training to be conducted outside the United States, its territories, and possessions. Accordingly, the Governor's authority over such training would be abrogated.

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[19] Army Regulation 350-9 and National Guard Regulation 310-1

V. CONSTITUTIONAL ISSUES

The central legal issue that must now be addressed is whether the proposed legislation is unconstitutional. The proposed legislation, included as enclosure 1 hereto, would remove any authority of the state and its Governor pertaining to overseas training of National Guard units or members. This purported change in the law would occur by modifying 32 U.S.C. § 501, 10 U.S.C. § 672(b), and 10 U.S.C. § 672(d). The current law and proposed law are set forth for comparison at enclosures 2 and 3.

A. MILITIA CLAUSE

The Militia clause[20] clearly reserves "to the States respectively, the Appointment of Officers, and the *Authority of training the Militia* according to the discipline prescribed by Congress." However, the question has been raised as to whether the Militia clause, as it pertains to the authority of training, is still applicable today to the Army and Air National Guard[21] as well as to the Army

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[20] Article I, § 8, cl. 16 which is set forth in full *supra*.

[21] 10 U.S.C. § 101(10) and 32 U.S.C. § 101(4) provide:

> "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that –
>
> (A) is a land force;
> (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(Continued on following page)

and Air National Guard of the United States.[22]

The Militia clause is still alive and well. Notwithstanding various reorganizations over the history of this nation, the militia remains in place as was intended by the framers of the U.S. Constitution. The U.S. Supreme Court has clearly recognized that the militia reserved to the states by the Constitution is the National Guard of

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> (C) is organized, armed, and equipped wholly or partly at Federal expense; and
> (D) is federally recognized.

10 U.S.C. § 101(12) and 32 U.S.C. § 101(6) provide:

> "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that –
>
> (A) is an air force;
> (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;
> (C) is organized, armed, and equipped wholly or partly at Federal expense; and
> (D) is federally recognized.

[22] 10 U.S.C. § 101(11) and 32 U.S.C. § 101(5) provide:

> "Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard.

10 U.S.C. § 101(13) and 32 U.S.C. § 101(7) provide:

> "Air National Guard of the United States" means the reserve component of the Air Force all of whose members are members of the Air National Guard.

Also, see 10 U.S.C. § 3077 and 10 U.S.C. § 8077 concerning the Army and Air National Guard of the United States quoted in footnote 8 *supra*.

today. *Maryland v. United States*, 381 U.S. at 46. The term National Guard "means the Army National Guard and the Air National Guard."[23] Congress has recognized that the National Guard is the militia referred to in the Militia clause of the Constitution by expressly providing that the "Army and Air National Guard" means that part of the organized militia of the several states that is *trained* and has its officers appointed, under Article I, § 8, cl. 16.[24]

The National Guard of the United States was created by Congress in 1933, Act of June 15, 1933, ch. 87, 48 Stat. 153. The purpose of the 1933 Act was to authorize the federal government to order the National Guard into federal service for purposes other than those stated in Article I, § 8, cl. 15, for calling forth the militia (National Guard), "namely to execute the Laws of the Union, suppress Insurrections and repel Invasions." Before this Act, members of the National Guard were drafted into the Federal service as individual citizens without regard to membership or rank in the National Guard for purposes other than stated in Article I, § 8, cl. 15. In concluding that there was no "constitutional or legal objection" to the creation of this organization, Congress envisioned its use only in the event of war or other emergency declared by Congress:

> "Congress had the power under the Army provisions of the Constitution to amend the National Defense Act so as to set up a reserve organization as a part of the Army of the United

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[23] 10 U.S.C. § 101(9) and 32 U.S.C. § 101(3).

[24] 10 U.S.C. §§ 101(10) and (12); and 32 U.S.C. §§ 101(4) and (6) which are quoted in footnote 21 *supra*.

> States, which should comprise the officers and men of the National Guard of the States, Territories and District of Columbia, and to so provide that the organization of such reserve would in no manner affect the administration, officering, training, and control of the National Guard as State forces in time of peace; but that such reserve organization of the Army of the United States would function as such only in the event of war or other emergency declared by Congress."

H.R. Rep. No. 141, 73d Cong., 1st Sess. 3 (1933).

The Army and Air National Guard of the United States are also subject to the Militia clause. The Army and Air National Guard of the United States consists of federally recognized units and organizations of the Army and Air National Guard, and of members of the Army and Air National Guard who are also Reserves of the Army or Air Force. All members of the Army or Air National Guard of the United States must first be members of the Army or Air National Guard of a state.[25] Thus, these two organizations are composed of the same federally recognized units and the same federally recognized people. Accordingly, a soldier's status as a member of the Army or Air National Guard of the United States and his/her simultaneous status as a member of the Army or Air National Guard of a state are inseparably intertwined. As the authority of training is expressly reserved to the states by the Militia clause,[26] the states' authority over training

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[25] See footnotes 8 and 22 *supra*.

[26] In *Houston v. Moore*, 18 U.S. (5 Wheat) 1, 36-37, Justice Johnson of the U.S. Supreme Court recognized that Congress'

(Continued on following page)

extends to the training of Guard members and units in either status. Otherwise, the federal government would have the unrestrained power to conduct all training in a federal active duty status and take away a state's organized militia.

While the states retain the authority of training, such training is to be conducted "according to the discipline prescribed by Congress". The "discipline prescribed by Congress" has been applied through various statutes passed by Congress and enacted in law. The training standards contained in title 32 of the United States Code reflect the most pertinent examples. It is provided in 32 U.S.C. § 501(a) that the discipline, including training, of the Army and Air National Guard shall conform to that of the Army and the Air Force. However, consistent with the Militia clause, Congress placed the authority to conduct training with the states.[27] A good example of a proper "discipline prescribed by Congress" is the requirement for 48 drills per year and 15 days of annual training

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power over the militia (National Guard) was limited by the two reservations in favor of the states in the Militia clause, namely the right of officering and that of *training* the militia. Furthermore, he stated:

> Indeed, extensive as [Congress'] power over the militia is, the United States [is] obviously intended to be made dependant upon the States for this . . . force. For, if the States will not officer or train the men, there is no power given to Congress to supply the deficiency. *Id.* at 37.

[27] 32 U.S.C. 501(b).

for units and members of the Army and Air National Guard.[28]

In researching the Constitutional question at issue, the legislative history of various important legislation affecting the National Guard was examined. This legislation included the Militia Act of 1792,[29] the Dick Act,[30] the National Defense Act of 1916,[31] the National Defense Act Amendments of 1933,[32] and the Armed Forces Reserve Act of 1952.[33] It should be noted, however, that such legislative history is not determinative on issues of Constitutional law and interpretation. On the other hand, the authority of the states over training of Guard units and members was clearly recognized in the legislative history.

B. THE ARMY CLAUSE

An issue arises as to whether the Army clause (the power to raise and support armies)[34] overrides the Militia

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[28] 32 U.S.C. 502. Also see *Greenwood v. Department of Military Affairs*, 78 Pa. Commw. 480, 468 A. 2d 866 (1983):

> One element of the "discipline prescribed by Congress" is the fifteen-day annual encampment of all guardsmen for maneuvers, target practice and field exercises funded by the federal government. *Id.* at 870.

[29] Act of May 8, 1792, ch. 33, 1 Stat. 271

[30] Act of Jan. 21, 1903, 32 Stat. 775

[31] Act of June 3, 1916, ch. 134, 39 Stat. 166

[32] Act of June 15, 1933, ch. 87, 48 Stat. 153

[33] Act of July 9, 1952, 66 Stat. 481

[34] Article I, § 8, cl. 12; The War clause (Article I, § 8, cl. 11) is not addressed since it is not deemed applicable to overseas training in peacetime which is at issue here.

clause[35] in the case of the proposed legislation which would abrogate the Governor's authority pertaining to overseas training of guard units and members. Based on a review of the relevant case law concerning the relationship between the Army clause and the Militia clause, it is concluded that the Army clause would not nullify the Militia clause as it pertains to the states' authority over training, including overseas training. No cases were found that specifically address this issue.

The U.S. Supreme Court has addressed the relationship between the Army clause and the Militia clause in several cases, including *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox v. Wood*, 247 U.S. 3 (1918).

In *Selective Draft Law Cases*, the constitutionality of a selective draft law was at issue at a time of war (World War I). The Army clause was held to override any objections to the law based on the Militia clause.

> The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant. *Id.* at 383

However, this case has no bearing on the Militia clause as it pertains to peacetime training of the National Guard. The states' reserved powers under the militia clause pertaining to the appointment of officers and the authority of training the National Guard were not at issue.

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[35] Article I, § 8, cl. 15 and 16

The Solicitor General arguing on behalf of the compulsory draft law stated that the law did not affect the right of the states to organize and *train* the militia:

> The present law draws into the National Army but a small portion of the militia as a whole, and the withdrawal from possible call for local service is only temporary. . . .
> The right of the States to organize and train the militia remaining has been recognized and safeguarded. *Id.* at 377.

The other Supreme Court case, also decided during World War I, is *Cox v. Wood*, 247 U.S. 3 (1918), which concerned a service member's assertion that under the Militia clause he was entitled to "constitutional immunity from military service beyond the territorial limits of the United States." 247 U.S. at 4. The service member argued that the authority of Congress was limited by Article I, § 8, cl. 15 to calling forth the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions", and that Congress could not require service abroad. The court held that this part of the Militia clause (Article I, § 8, cl. 15) did not restrict such service abroad in view of Congress' power under the War clause and the Army clause. This case does not, however, address peacetime training of National Guard units and members, or the states' reserved right to conduct such training which is set forth in a different clause, Article I, § 8, cl. 16.

C. INTERPRETATION OF THE CONSTITUTION PROVISIONS

Concerning the proposed legislation, there is no compelling need or reason to interpret the Army clause and

the Militia clause as being inconsistent. This is not a wartime or national emergency situation as existed when the above referenced U.S. Supreme Court cases were decided. The issue to be resolved is peacetime training of the National Guard which is specifically and plainly reserved to the states by Article I, § 8, cl. 16 of the Constitution.

The U.S. Supreme Court has long held that no clause in the Constitution is intended to be without effect and that Congress may not alter the Constitution by ordinary legislative act.[36] Subsequently, this holding was expanded by the Supreme Court when it held that "[t]he Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity."[37] Also, the Supreme Court held that when "fundamental principles [of the Constitution] are of equal dignity, neither must be so enforced as to nullify or substantially impair the other."[38]

Congress in carrying out its legislative responsibility must not give precedence to the "Army" clause over the "militia" clause. It must construe the clauses in a manner to make both clauses operative. It may not interpret the "Army" clause to nullify or impair the clear intent of the "Militia" clause as to training of Guard unit and members.

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[36] *Marbury v. Madison*, 5 U.S. (1 Cranch) 173 (1803)

[37] *Prout v. Starr*, 188 U.S. 537, 543 (1903)

[38] *Dick v. United States*, 208 U.S. 340, 353 (1908)

As the Militia clause of the Constitution clearly and expressly places the authority of training the National Guard with the states, the proposed legislation is unconstitutional to the extent that it removes the requirement for the Governor's consent for overseas training.

D. CONCLUSION

Earlier in this memorandum the current statutory authorities for calling or ordering the National Guard into federal service were discussed. The various authorities for involuntarily calling the National Guard into federal service[39] are consistent with the purposes set forth in Article I, § 8, cl. 15. The current authorities for involuntarily ordering the National Guard into Federal service[40] are lawful under Congress' authority under the War clause and the Army clause. Under these sections, National Guard units or members may be involuntarily ordered to active duty because of war, national emergency, or to augment active forces for an operational mission.

However, the proposed legislation goes beyond the limits of the War clause and the Army clause. It would extend to the peacetime training of the National Guard which is Constitutionally reserved to the states by the Militia clause. Accordingly, the proposed legislation would be unconstitutional if enacted into law.

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[39] 10 U.S.C. § 331, 10 U.S.C. § 332, 10 U.S.C. § 333, and 10 U.S.C. § 3500 and § 8500.

[40] 10 U.S.C. § 672(a), 10 U.S.C. § 673(a), and 10 U.S.C. § 673b.

Congress does have the power, however, to pass legislation for overseas deployments to augment active forces for operational missions, such as 10 U.S.C. § 673(b). Currently, the President under this section of the U.S. Code can order up to 100,000 Reservists to active duty for a period of 90 days in duration to augment the active forces for any operational mission. Such an order for an operational mission would not be restricted by the Militia clause since it would not be for training.

In summary, the major Constitutional flaw with this legislation is that it would abrogate the reserved right of the states to train their National Guards.

Prepared by:
Office of Legal Advisor
National Guard Bureau
July 1986

TO RECEIVE TESTIMONY ON FEDERAL AUTHORITY OVER NATIONAL GUARD TRAINING

TUESDAY, JULY 15, 1986

United States Senate
Committee on Armed Services
Subcommittee on Manpower & Personnel
Washington, D. C.

The Subcommittee met, pursuant to notice, at 9:06 a.m., in Room SR-232A, Russell Senate Office Building, The Honorable Pete Wilson (Chairman of the Subcommittee), presiding.

Members Present: Senators Barry Goldwater, Pete Wilson, Jeremiah Denton, Phil Gramm, James T. Broyhill, John C. Stennis, J. James Exon, Carl Levin and John Glenn.

Committee Staff Members Present: Arnold L. Punaro, Staff Director for the Minority; Patrick A. Tucker, General Counsel; and Jeffrey H. Smith, Minority Counsel.

Professional Staff Members Present: Robert E. Bayer, Robert G. Bell, David S. Lyles and Patricia L. Watson.

Staff Assistant Present: Marie F. Dickinson.

Committee Members' Assistants Present: Romie L. Brownlee, Assistant to Senator Warner; Mark J. Albrecht, Assistant to Senator Wilson; Allan W. Cameron, Assistant to Senator Denton; Alan Ptak, Assistant to Senator Gramm; Francis J. Sullivan, Assistant to Senator Stennis; Janne E. Nolan, Assistant to Senator Hart; Jeffrey B. Subko, Assistant to Senator Exon; John B. Keeley, Assistant to Senator Levin; Thomas K. Longsteth, Assistant to Senator

Kennedy; Charles C. Smith, Assistant to Senator Dixon; and Phillip P. Upschulte, Assistant to Senator Glenn.

Senator Wilson: Good morning, ladies and gentlemen.

This hearing will come to order.

The Subcommittee meets this morning with all members of the full Committee invited to attend to consider the question of whether it is now appropriate to change the Federal policy which permits governors of the several states to prevent the training of members of the units of the Army and Air National Guard of the United States.

There should be no question about why this hearing is being held. It is being held because the governors of several states have either denied consent or have said they would deny consent for members of the National Guard from their states to participate in training in Central America or in selected countries in Central America.

The Governor of Maine denied consent for a 35-member Army National Guard Engineering Detachment and a 13-member Army National Guard Public Affairs unit to participate in training

Let me state, sir, that the DOD's position, and I quote from Secretary Webb's memo to me, dated 6 May, 1986, one paragraph:

"I must advise you that it is the official position of the Department of Defense to say there is no constitutional inhibition against the enactment of legislation that would alter the requirement of 10 U. S. Code, section 672,

that a governor consent to training that takes place outside the continental U. S. Such legislation would be permissible under the Army clause, Article 1, Section (a) of the Constitution which has governed the issue of the National Guard status as a Federal Reserve component."

Senator Levin: General Walker, do you oppose this legislation as being unnecessary?

Is that the bottom line, your personal opinion is in opposition?

General Walker: Sir, that is exactly the way I feel about it. I do not think we need it. I have no necessity for it to do my job. I just think it is something you are tinkering with that has served us well for years and years and years and that is state control.

Senator Levin: Did your first statement make your personal position clearer, first draft, than the draft you delivered this morning?

General Walker: Yes, sir.
